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In the Supreme Court of the United States

OCTOBER TERM, 1958

SANGAMON VALLEY TELEVISION CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court below (Pet. App. 1a–2a) is reported at 255 F. 2d 191. The basic decision of the Federal Communications Commission (R. 679–695) is reported at 22 F. C. C. 318, and its decision denying rehearing (R. 1103–1112) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit, affirming the decision of the Commission, was entered on May 1, 1958. The petition for a writ of certiorari was

filed on July 30, 1958. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Whether the Federal Communications Commission, in reassigning television channels in Springfield, Illinois; Terre Haute, Indiana; and St. Louis, Missouri, in order to provide a greater amount of television service to each of the communities involved, violated Section 307 (b) of the Communications Act.

STATUTE INVOLVED

The pertinent provision of the Communications Act of 1934 (48 Stat. 1084, as amended, 49 Stat. 1475, 66 Stat. 714; 47 U. S. C. 307 (b)) is set forth in the Petition at p. 2.

STATEMENT

The Federal Communications Commission on March 1, 1957, after full rule-making proceedings, adopted an order which modified Section 3.606 of its Rules, comprising a nationwide allocation of television channels, by transferring very high frequency (VHF) channel 2 from Springfield, Illinois, to Terre Haute, Indiana, and St. Louis, Missouri, and by adding ultra high frequency (UHF) channels 26 and 36 to those previously assigned to Springfield (22 F. C. C. 318, 22 F. R. 1484). As a result of this action, Springfield, which previously had been assigned one VHF channel (Channel 2) and two UHF channels (Channels 20 and 66), was now assigned four channels, all in the UHF portion of the television band.[1] At the same time,

[1] One of these channels was reserved for noncommercial, educational use.

St. Louis was provided with a fourth commercial VHF channel, and Terre Haute with a second VHF channel. Both of the latter cities had previously been assigned a number of UHF channels and retained these assignments with the exception of St. Louis UHF channel 36 which was reassigned to Springfield. Terre Haute, however, never had a station in operation on any of its UHF channels, and, while a number of permits had been issued for UHF stations in St. Louis, only one UHF station remained in operation at the time of the reallocation, and it was operating at a heavy annual loss.

The action of the Commission in shifting VHF and UHF channels in these areas was one of some nine actions taken on the same date in rule-making proceedings initiated for the purpose of improving opportunities for competition among a greater number of stations in individual communities by deleting VHF channels in established UHF markets and/or by adding VHF channels in predominantly VHF markets. Another of these rule-making proceedings (involving Peoria, Illinois, and the Tri-City area of Davenport, Rock Island and Moline in Iowa and Illinois) is now pending before the Court on petition for a writ of certiorari in *WIRL Television Company* v. *United States*, No. 242, this Term. The background of the Commission's efforts to find some effective way to use the 70 UHF channels to expand the nation's television service, is set forth in the Government's brief in opposition to certiorari in that case and is incorporated here.

In the instant proceeding, the Commission concluded that Springfield presented appropriate circumstances for deletion of a VHF channel from a UHF market under the criteria set forth in its June 26, 1956, Report and Order. The Commission found that the Springfield area was predominantly UHF, the terrain was ideally suited for UHF propagation, the vast majority of sets in the area were equipped to receive UHF transmission, and a number of UHF stations were providing satisfactory service. The Commission further found that although no predictable or significant portion of the Springfield viewing public would fail to receive satisfactory service if two UHF channels were substituted for the one VHF, retention of the VHF assignment to Springfield would seriously jeopardize the ability of the UHF stations to continue to provide service.[2] The Commission accordingly concluded that the deletion of VHF channel 2 from Springfield would "enhance the opportunities for effective competition among a great number of stations" in that community (R. 689). The Commission also concluded that reassignment of this VHF channel to St. Louis and Terre Haute would result in a "more effective and efficient utilization of the scarce VHF spectrum" in view of the "need and demand" for additional service in those primarily VHF markets which their existing UHF allocations could not, as a practical matter, provide (R. 689–690).

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[2] The Commission also found that deletion of the Springfield VHF channel, which provided parts of the Peoria area with VHF service, would implement its simultaneous decision to make the Peoria area all UHF (22 F. C. C. at 327).

Petitioner was an applicant in the comparative proceeding for channel 2 in Springfield. Shortly after commencement of these rule-making proceedings, the Commission issued a decision in the comparative hearing awarding the grant to another applicant, but conditioning it upon the outcome of the proceedings looking towards substitution of UHF channels for channel 2. Petitioner unsuccessfully sought reconsideration of the comparative grant and simultaneously participated fully in the rule-making proceeding, urging retention of channel 2 in Springfield. It both appealed from the denial of its application[3] and sought review, in this case, of the Commission's final determination to shift channel 2 from Springfield to the St. Louis-Terre Haute area.

On review, the Court of Appeals, in a *per curiam* opinion, unanimously affirmed the Commission's action. Rejecting petitioner's contention that the reassignment of channel 2 was "inconsistent with section 307 (b) of the Communications Act," the court stated (Pet. App. p. 2a):

> We are unable to sustain this attack. Upon the basis of a full hearing the Commission weighed the various factors involved and reached a reasoned decision within its competence. We find nothing arbitrary, capricious or otherwise illegal in the decision, and it accordingly is affirmed.

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[3] This action, *Sangamon Valley Television Corp.* v. *Federal Communications Commission*, Case No. 13,991 in the court of appeals below, was deferred by order of the court dated August 16, 1957, pending disposition of the instant case.

ARGUMENT

Petitioner's sole argument here (Pet. 12, 13), that the reassignment of channels in deleting Springfield's only VHF channel violates Section 307(b) of the Communications Act, is identical with a similar argument of the petitioner in *WIRL Television Company* v. *United States*, No. 242, this Term (Pet. 13–21), and is equally insufficient as a basis for a grant of certiorari. Here, as there, the objective of the Commission's action was not to protect the private interests of existing UHF stations, as petitioner contends, but to distribute frequencies in the manner best calculated to provide the greatest amount of actual television service to the states and communities involved. Indeed, here, as there, the decision of the Commission rests on findings of fact, approved by the court below, that Springfield, St. Louis, and Terre Haute would all be afforded an opportunity for satisfactory service by a greater number of stations if the VHF channel were reassigned from Springfield to Terre Haute and St. Louis (R. 689–690). There is nothing inconsistent with Section 307(b) in either the Commission's objective or its supporting findings, and the court of appeals correctly so held in affirming the Commission's action (Pet. App. 2a).

Since the decisions of the Commission and the court below comport with Section 307 (b), there is no merit in petitioner's claim of conflict with either *Federal Radio Commission* v. *Nelson Brothers Bond and Mortgage Co.*, 289 U. S. 266, or *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U. S. 358. On the contrary, the instant case ac-

cords in full with this Court's construction of the statutory predecessor of Section 307 (b). In the *Nelson* case, this Court said (289 U. S. at 281):

> The command [of the statute] is that there shall be a "fair and equitable allocation of licenses, wave lengths, time for operation and station power to each of the States within each zone." *It cannot be said that this demanded equality between States with respect to every type of station.* * * * [Emphasis added.]

Moreover, in the *Allentown* case this Court gave express recognition (349 U. S. at 362) to the validity of the Commission view, also involved here, that the bringing of multiple services to significant communities was an appropriate consideration under Section 307 (b).

CONCLUSION

For the foregoing reasons stated here, and in the brief in opposition filed by the United States and the Commission in *WIRL, supra,* the petition for a writ of certiorari should be denied.

We believe it proper, however, to call the Court's attention to certain testimony given before the Subcommittee of Legislative Oversight of the House Committee on Interstate and Foreign Commerce on May 22, 26, and 28, 1958, and June 9, 10, and 11, 1958, subsequent to the decision by the court of appeals affirming the Commission's order. The testimony indicates that after the rule-making proceeding here had been initiated by Notice of Proposed Rulemaking, and while it was under consideration by the Commission, representatives of the St. Louis operator of a UHF station

who was interested in having a new VHF channel assigned to St. Louis, and representatives of the petitioner and the other applicant for VHF Channel 2 in Springfield, who were interested in retaining that channel in Springfield, made *ex parte* presentations with respect to merits of the rule-making proceeding to various members of the Commission.

These matters were not presented to the court below and are not presented by the petition. For this reason, the respondents do not and would not regard denial of certiorari as foreclosing appropriate consideration thereof by the court of appeals.

Respectfully submitted.

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